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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. _____.

GRAVES, INC., PETITIONER,

VS.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Graves, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on February 27, 1953, and the order of said Court denying the petitioner a rehearing entered on March 26, 1953. The United States Court of Appeals granted a stay of its mandate on April 3, 1953.

OPINIONS BELOW.

The opinion of the Tax Court of the United States is reported in 16 T. C. 1566. The opinion of the United States Court of Appeals for the Fifth Circuit is reported in 202 F. 2d 284, Advance Sheet published the 20 day of April, 1953.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1251 (1) and Section 1141(a) of the Internal Revenue Code. The judgment of the United States Court of Appeals to be reviewed was entered on February 27, 1953 (R. 275), and the petition for rehearing was denied on March 26, 1953 (R. 310).

STATEMENT OF THE MATTER INVOLVED.

Petitioner, a Mississippi corporation, increased its capital stock by $90,000.00 in March, 1943. This additional stock was paid for by two of the stockholders of the corporation causing to be delivered to said corporation three demand notes for $30,000.00 each of Sopaco Finance Company, a partnership composed of persons other than the stockholders. The Tax Court found:

> "Sopaco and its successor, the Wilson Investment Company, had sufficient cash and liquid assets to pay the three $30,000.00 demand notes at any time that petitioner may have requested" ((R. 28).

Graves, Inc., took credit for the $90,000.00 of additional capital stock on its excess profits tax for the calendar year 1943. The Commissioner of Internal Revenue disallowed said credit on the ground that same was not

invested capital under Section 718 or a capital addition under Section 713 of the Internal Revenue Code for the purpose of computing the excess profits credit.

In the proceedings before the Tax Court it was urged —(1) that the additional capital stock was not actually "invested" in the business within the meaning of the Internal Revenue Law; and (2) that said transaction was in violation of Section 5327 of the Mississippi Code of 1942 prohibiting the issuance of capital stock for notes given or transferred by a stockholder.

Graves, Inc., insisted before the Tax Court that the additional capital was invested in the business within the meaning of the Internal Revenue laws and that the same was not in violation of Section 5327 of the Mississippi Code of 1942. The Tax Court wholly ignored the argument with respect to the violation of the Mississippi statute and decided this case on the ground that the additional capital was not actually "used or invested" in the business (R. 24-35).

The United States Court of Appeals apparently disagreed with the conclusion of the Tax Court and stated in its opinion:

> "With convincing logic, the petitioner urges upon us that the Tax Court's opinion is based upon hindsight rather than upon the foresight of a reasonably prudent business man who would have anticipated that the increase in capital stock was required for the additional lines of business that were contemplated, and that the additional capital was prudently invested" (R. 277).

The United States Court of Appeals, however, proceeded to hold that the transaction was in violation of the spirit of Section 5327, Mississippi Code of 1942, if not in violation of the language thereof.

QUESTIONS PRESENTED.

1. Whether solvent demand notes constitute "property" within the meaning of Section 718 of the Internal Revenue Code, 26 U. S. C. A. 718, and under Section 713 of the Internal Revenue Code, 26 U. S. C. A. 713, in the event the issuance of said notes for stock is a voidable transaction under a state statute.

2. Whether the issuance of notes of a third party not a stockholder of a corporation as a consideration for the issuance of its capital stock and under such circumstances as to be essentially equivalent to a cash transaction violates Section 5327, Mississippi Code of 1942.

STATUTES INVOLVED.

The pertinent provisions of Section 718, 26 U. S. C. A. 718, and Section 713, 26 U. S. C. A. 713, and also the provisions of Section 5327, Mississippi Code of 1942, are set forth in the Appendix.

SPECIFICATION OF ERRORS TO BE URGED.

The United States Court of Appeals erred:

1. In holding that a corporate taxpayer is not entitled to credit on its excess profits tax for additions to capital stock paid for with solvent demand notes of a non-stockholder where the issuance of such notes was voidable under the laws of the state where the corporation was domiciled.

2. In failing to hold that the transaction whereby the petitioner issued additional capital stock was the

equivalent of a cash transaction and was not in violation of Section 5327, Mississippi Code of 1942.

3. In affirming the order of the United States Tax Court.

REASONS FOR GRANTING THE WRIT.

I.

This Case Raises Important Questions of Federal Law Which Have Not Been, but Should Be, Settled by This Court.

The question of what constitutes property under Section 718 of the Internal Revenue Code and Section 713 of the Internal Revenue Code is a matter of Federal law and should not be subject to be defeated by state statutes relative to the manner in which capital stock is to be increased. The decision of the United States Court of Appeals is very far reaching and may have the effect of granting relief from taxation to corporations in one state and denying the same relief to corporations in another state. The United States Court of Appeals for the Fifth Circuit recognized that its decision was so broad that it would have the effect of denying to a corporation paying for its capital stock with United States Government Bonds the right to credit therefor on its excess profits tax (R. 278). It is highly important that this question be clarified for the benefit not only of the petitioner herein but of numerous corporate taxpayers throughout the country that have paid for their stock with "property" other than cash.

A leading authority on corporations, Fletcher's Cyclopedia, Corporations, Volume 11, Page 446, recognizes that under modern business methods actual cash is rarely de-

livered in payment of stock. Nearly all corporations pay for their stock in property, some of which usually consists of liquid securities. If a transaction entered into in the utmost of good faith, where stock is paid for with solvent, liquid and readily collectible securities, is not to be recognized for credit for excess profits tax purposes, such decision will very probably have a very far reaching effect and is of sufficient importance that this Honorable Court should review the same.

II.

The Decision Is in Conflict with Other Decisions of the Federal Court and of the Tax Court.

While it does not appear that any other United States Court of Appeals has passed on this exact question and there is therefore no conflict between the decisions of the United States Court of Appeals on this question, we submit with deference that the decision of the United States Court of Appeals for the Fifth Circuit is in conflict with the principles announced in the case of *Max Kaufman & Co.* v. *Bowers, Collector of Internal Revenue*, 11 F. 2d 662, and is also in conflict with the principles announced in the case of *Maverick-Clark Lithographing Company* v. *Commissioner of Internal Revenue*, 11 T. C. 1087. As a matter of fact, we believe the decision of the United States Court of Appeals to be at least inferentially in conflict with the decision of the Tax Court in this case. The Court of Appeals expresses disagreement with the Tax Court insofar as the reasons assigned by the Tax Court for its decision are concerned. While the Tax Court did not specifically decide the question on which the Court of Appeals based its decision, the Tax Court declined to even discuss the question that was raised and argued in the briefs and, therefore, apparently followed its own decision

in the case of *Maverick-Clark Lithographing Company* v. *Commissioner of Internal Revenue*, 11 T. C. 1087.

III.

The Decision of the Court Below Was Clearly Erroneous.

While we realize that this Honorable Court will not review the decision of the Court below solely on the ground that such decision is probably erroneous, in view of the other reasons which we believe to be valid we submit that the fact that the decision of the Court below appears to be erroneous is a matter which we think should be given some weight in determining whether a writ of certiorari should be granted. The transaction in this case was essentially equivalent to a cash transaction, and the Court below should have held that it was not in violation of Section 5327 of the Mississippi Code of 1942. *Bazley* v. *Commissioner of Internal Revenue*, 331 U. S. 737 (515) (1947); *Citizens National Bank of Stamford* v. *Stevenson*, (Commission of Appeals of Texas, June 1, 1921) 231 S. W. 364; *Morse on Banks and Banking*, Sec. 451; *Bartley* v. *State*, 53 Neb. 310, 73 N. W. 744; *Oddie* v. *National City Bank of New York*, 45 N. Y. 735; *State* v. *Rose*, 55 Or. 450, 104 Pac. 596; 106 Pac. 1022, 42 L. R. A. (N. S.) 601, 613; *Anderson* v. *Walker, County Judge*, 93 Tex. 119, 53 S. W. 821; *Fletcher, Cyclopedia Corporations*, Volume 11, Section 5194, Page 444; *Thompson on Corporations*, Third Edition, Volume 5, Section 3957, Page 824; *White* v. *Eiseman*, 134 N. Y. 101, 31 N. E. 276; *People* v. *Stockton & C. R. Co.*, 45 Cal. 306, 13 Am. Rep. 178; *Southern Life Insurance and Trust Company* v. *Lanier*, 5 Fla. 110, 58 Am. Dec. 448.

Even if said transaction should be held to be technically in violation of Section 5327, Mississippi Code of 1942, the issuance of said stock was not void but merely voidable. *Lewis* v. *Robertson*, (Miss., 1850) 13 Smedes &

Marshal 558; *Allen* v. *Edwards,* (1908) 93 Miss. 719, 47 So. 382; *Frazier* v. *Zachariah,* (1936) 174 Miss. 378, 164 So. 893; *Gordin* v. *Bank of Forest,* 170 Miss. 56, 153 So. 375; 154 So. 441; *Washer* v. *Smyer,* 109 Tex. 398, 211 S. W. 895, 4 A. L. R. 1320.

A corporate taxpayer should not be denied relief under the Federal statutes, Section 718 and Section 713, Internal Revenue Code, providing in effect that capital stock may be paid for with "property," under the circumstances involved in this case. *Max Kaufman & Co.* v. *Bowers, Collector of Internal Revenue,* 11 F. 2d 662; *Maverick-Clark Lithographing Company* v. *Commissioner of Internal Revenue,* 11 T. C. 1087.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Court of Appeals for the Fifth Circuit, sitting at New Orleans, Louisiana, commanding that Court to certify and to send to this Court, on a day certain to be therein named, a full and complete transcript of the record and all proceedings had in this case numbered and entitled on its docket 14,092, to the end that this case may be reviewed and determined by this Court; that the said judgment of the United States Court of Appeals for the Fifth Circuit may be reversed by this Court; and that your petitioner may have such other and further relief in the premises as may seem just and proper.

And your petitioner will ever pray, etc.

Graves, Inc.,

By _____

Petitioner.

_____

Attorney for Petitioner.

APPENDIX.

26 U. S. C. A. 718, 713.

"SEC. 718. EQUITY INVESTED CAPITAL.

"(a) DEFINITION.—The equity invested capital for any day of any taxable year shall be determined as of the beginning of such day and shall be the sum of the following amounts, * * *

"(1) MONEY PAID IN.—Money previously paid in for stock, or as paid-in surplus, or as a contribution to capital;

"(2) PROPERTY PAID IN.—Property (other than money) previously paid in (regardless of the time paid in) for stock, or as paid-in surplus, or as a contribution to capital. Such property shall be included in an amount equal to its basis (unadjusted) for determining loss upon sale or exchange. * * *

"SEC. 713. EXCESS PROFITS CREDIT—BASED ON INCOME.

* * * * * * *

"(g) ADJUSTMENTS IN EXCESS PROFITS CREDIT ON ACCOUNT OF CAPITAL CHANGES.—For the purposes of this section—

"(1) The net capital addition for the taxable year shall be the excess, divided by the number of days in the taxable year, of the aggregate of the daily capital addition for each day of the taxable year over the aggregate of the daily capital reduction for each day of the taxable year.

* * * * * * *

"(3) The daily capital addition for any day of the taxable year shall be the aggregate of the amounts of money and property paid in for stock, or as paid-in surplus, or as a contribution to capital, after the beginning of the taxpayer's first taxable year under this subchapter and prior to such day. In determining the amount of any property paid in, such property shall be included in an amount determined in the manner provided in section 718 (a) (2). * * *"

SECTION 5327, MISSISSIPPI CODE OF 1942:

"§ 5327. Stock must be actually paid for.—A note, obligation, or security of any kind given or transferred by any subscriber for stock in any corporation shall not be considered, taken, or held as payment of any part of the capital stock of the company."

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 42

GRAVES, INC., *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 24-35) is reported in 16 T.C. 1566. The opinion of the Court of Appeals (R. 274-278) is reported in 202 F. 2d 286.

JURISDICTION

The judgment of the Court of Appeals was entered on February 27, 1953. (R. 278.) The

taxpayer's petition for rehearing was denied on March 26, 1953. (R. 306.) The petition for a writ of certiorari was filed on April 22, 1953. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

Whether the court below correctly affirmed the Tax Court's decision holding that the amount of the $90,000 in promissory notes, given early in the taxable year for the taxpayer's stock, which were never presented for payment but were returned to the makers after the end of the taxable year, did not constitute equity invested capital or a net addition thereto under Sections 718 (a) and 713 (g) of the Internal Revenue Code for excess profits tax purposes.

STATUTES AND REGULATIONS INVOLVED

The applicable provisions of the statutes and regulations involved are set forth in the Appendix, *infra*, pp. 10-15.

STATEMENT

The facts, as found by the Tax Court (R. 25-32), may be summarized as follows:

The authorized capital stock of Graves, Inc. (the taxpayer), a corporation organized under the laws of Mississippi, was increased early in 1943 from $10,000 to $100,000 (R. 26). On April

8, 1943, $40,000 of the additional stock was issued to Mrs. Viola Graves, and $50,000 to Mrs. Margaret W. Graves (R. 27). Payment for the stock—required by resolution of the taxpayer's board of directors to be "sold for cash" (R. 27)—was made in the following manner: The two Mrs. Graves each executed and delivered two promissory notes to the Sopaco Finance Company, a partnership (hereinafter called Sopaco). The two notes of Mrs. Viola Graves were each in the amount of $20,000, and those of Mrs. Margaret W. Graves were in the amount of $25,000. All four notes carried interest at the rate of 6% per annum, and were due and payable January 1, 1944. The stock issued by the taxpayer was pledged as security. Sopaco, in turn, executed and delivered to the taxpayer three promissory notes, payable on demand, each in the amount of $30,000 and bearing interest at 2% per annum. Sopaco and its successor, the Wilson Investment Company, had sufficient cash and liquid assets to pay the three $30,000 demand notes had the taxpayer at any time requested payment. (R. 28.) Each year the Wilson Investment Company paid the taxpayer the interest due on the latter three demand notes, and dividends were paid on the additional stock issued to the two Mrs. Graves (R. 30.)

At a stockholders' meeting held on March 13, 1946, a reduction of $70,000 in the taxpayer's out-

standing capital stock was authorized. The two Mrs. Graves surrendered for cancellation the $90,000 par value of stock certificates which had been issued to them, and each received in turn a new certificate for $10,000 par value of stock. (R. 30.)

On March 20, 1946, the taxpayer returned to the Wilson Investment Company the three $30,000 demand notes. No part of the principal amount of these notes had been paid. Thereupon, the Wilson Investment Company returned to the two Mrs. Graves the promissory notes notes they had executed and delivered to Sopaco, which had become due and payable on January 1, 1944, but no portion of the principal amount of which had been paid. It was not intended that payments should be made on any of these notes unless and until the financial conditions of Graves, Inc., required such payment. (R. 30.)

The Tax Court held that the $90,000 represented by the notes deposited with the taxpayer did not constitute equity invested capital or a capital addition thereto for excess profits tax purposes for the taxable year involved. (R. 32-35.) The Court of Appeals affirmed, on the ground that the notes used to pay for the stock were not legally enforcible obligations under Section 5327 of the Mississippi Code Annotated, and that the amount of the notes was not, for that reason, invested

capital or a capital addition for excess profits tax purposes under the federal statute[1] (R. 274-278).

ARGUMENT

Petitioner contends (Pet. 7-8) that the decision of the court below is erroneous on the ground that even if the sale of the stock for uncollected demand notes be held to be a technical violation of Mississippi law, it should not be denied relief under the Federal statute[2] which provides in effect that capital stock may be paid for with "property" for equity invested capital purposes under circumstances such as are involved here. The contention is without merit.

The notes involved were clearly invalid, under Mississippi law, for the purpose of paying for stock subscriptions. Section 5327 of the Mississippi Code Annotated (1942), *infra*, p. 14, plainly and unambiguously provides that a note given or transferred by any subscriber for stock in any corporation, shall not be considered as payment of any part of the capital stock of the company. The payee of a note given in payment for stock in a Mississippi corporation cannot recover thereon, nor can a purchaser with

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[1] The question whether the notes were valid obligations under Mississippi law was raised by the Commissioner in the Tax Court but was not reached by that Court.

[2] Sections 718 and 713 of the Internal Revenue Code, *infra*, pp. 13-14, 11-12.

notice. *Jones Drug Co.* v. *Williams,* 139 Miss. 170; *Aldrich* v. *Rice,* 161 Miss. 879. The Mississippi statute applies after the corporation has become a going concern. *Merchants Bk. & Tr. Co.* v. *Walker,* 192 Miss. 737. As stated by the court below (R. 278), "The notes executed by Sopaco were *given* to Graves, Inc. by, or at the direction of, the subscribers. They were not *transferred,* in writing, but were purchased from Sopaco by the subscribers, and at their direction made payable to Graves, Inc. The transaction was the same in substance as if the Sopaco notes had been made payable to the subscribers and by them endorsed without recourse to Graves, Inc." Since the notes were invalid under Mississippi law, they were clearly not property within the meaning of Section 718(a)(2) of the Internal Revenue Code.[3] The application by the court below of the state law to the situation here involved is in harmony with the decisions of this Court. *United States* v. *Ogilvie Hardware Co.,* 330 U. S. 709, 718; *Helvering* v. *Stuart,* 317 U. S. 154, 161, 164, rehearing denied, 317 U. S. 711;

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[3] We find no Mississippi decisions, and petitioner cites none, holding that an invalid note is property under Mississippi law. An examination of the cases cited by petitioner (Pet. 7-8) discloses that they do not support its contentions that the transactions in question were essentially equivalent to cash transactions, and that the issuance of petitioner's stock for notes was not void but merely voidable under Mississippi law.

Lyeth v. *Hoey*, 305 U. S. 188, 193-194; *Blair* v. *Commissioner*, 300 U. S. 5, 9-10; *Freuler* v. *Helvering*, 291 U. S. 35, 43-45. Consequently, the judgment of the court below is correct under the theory used by it as a premise for its conclusions.[4]

The Tax Court found that the two Mrs. Graves, in effect, paid for the taxpayer's stock with notes purchased from Sopaco and made payable to petitioner instead of with cash as required by the directors' resolution (R. 27-28); that even though they were collectible demand notes (R. 28), they were nevertheless given to petitioner merely for its contingent use; and they were never collected or invested in its business, but instead were cancelled and returned intact to the subscribers, after the taxable year had ended and after the excess-

---

[4] We do not agree with petitioner's contention (Pet. 6-7) that the decision of the court below is in conflict with the decisions of the United States District Court for the Southern District of New York and the Tax Court in the cases of *Max Kaufman & Co.* v. *Bowers*, 11 F. 2d 662, affirmed as modified, 18 F. 2d 69 (C.A. 2), and *Maverick-Clark Litho Co.* v. *Commissioner*, 11 T. C. 1087, affirmed, 180 F. 2d 587 (C. A. 5), respectively. In the *Kaufman* case, the notes were not considered by the court (which cited *Jeffrey* v. *Selwyn*, 220 N. Y. 77), to be unenforcible under New York Law and under Sections 325 and 326 of the Revenue Act of 1918, 40 Stat. 1057, "tangible property" was defined as including "notes." Moreover, in that case, payments were actually made on the notes, while in the case at bar no payments whatever were made but, on the contrary, they were returned to the maker by petitioner.

The *Maverick-Clarke Litho Co.* case is obviously distinguishable on its facts.

profits tax legislation had been repealed, without having been used in petitioner's business (R. 30, 34-35); that "It was not intended that payments be made on any of these notes unless and until financial conditions of Graves, Inc., required such payment", which never eventuated (R. 30, 34). It thereupon found that "the amount of $90,000 covered by [the] demand notes was not *invested* in petitioner's business" (R. 32), and "the notes * * * were not utilized in the earning of its increased profits" (R. 35). (Italics supplied.)

In the circumstances, the Tax Court correctly concluded that the notes in question might not be considered as property paid in, invested and used as part of the working capital subject to the risks of the business in determining petitioner's profits for excess-profits tax purposes for the taxable year involved and the court below might well have affirmed on that ground. See *LaBelle Iron Works* v. *United States*, 256 U. S. 377, 387-391, 393; *Northwestern Motor Car Co.* v. *Commissioner*, 45 F 2d 357, 358-359 (C. A. 7); *Crescent Panel Co.* v. *Commissioner*, 12 B.T.A. 561, 563-5664; *Henderson Overland Co.* v. *Commissioner*, 4 B.TA.. 1088, 1092; *Diamond Red Paint Co.* v. *Commissioner*, 3 B.T.A. 688; Section 35.718-1, Treasury Regulations 112; S. R. 2294, IV-1 Cum. Bull. 268 (1925); cf. *Commissioner* v. *South Texas Co.*, 333 U.S. 496, 497-498; *Hart-Bartlett-Sturtevant Grain Co.* v. *Commissioner*, 12 T.C. 760, 768-770, affirmed, 182 F. 2d 153, 158 (C.A. 8); *Oswego & S. R. Co.*

v. *Commissioner*, 29 F. 2d 487, 489 (C.A. 2), certiorari denied, 279 U. S. 842; *West Construction Co.* v. *Commissioner*, 7 T.C. 974, 978. See also H. Rep. No. 2894, 76th Cong., 3d sess., p. 4; Senate Hearings, Second Revenue Act of 1940, 76th Cong., 3d sess., p. 143.

CONCLUSION

The decision of the court below is correct and further review is not warranted. The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

H. BRIAN HOLLAND,
Assistant Attorney General.

ELLIS N. SLACK,
S. DEE HANSON,
Special Assistants to the Attorney General,

JOHN R. BENNEY,
Attorney.

JUNE, 1953.

APPENDIX

Internal Revenue Code:

SEC. 710 [As added by Sec. 201, Second Revenue Act of 1940, c. 757, 54 Stat. 974.] IMPOSITION OF TAX.

(a) [As amended by Sec. 202, Revenue Act of 1942, c. 619, 56 Stat. 798] *Imposition.*—

(1) *General Rule.*—There shall be levied, collected, and paid, for each taxable year, upon the adjusted excess-profits net income, as defined in subsection (b), of every corporation (except a corporation exempt under section 727) a tax equal to whichever of the following amounts is the lesser:

(A) 90 per centum of the adjusted excess-profits net income * * *

* * * *

(b) *Definition of Adjusted Excess Profits Net Income.*—As used in this section, the term "adjusted excess profits net income" in the case of any taxable year means the excess profits net income (as defined in section 711) minus the sum of:

* * * *

(2) *Excess profits credit.*—The amount of the excess profits credit allowed under section 712; * * *

(26 U.S.C. 1946 ed., Sec. 710.)

SEC. 712 [As added by Sec. 201, Second Revenue Act of 1940, *supra*, and amended by Sec. 13, Excess Profits Tax Amendments of 1941, c. 10, 55 Stat. 17] EXCESS PROFITS CREDIT—ALLOWANCE.

(a) *Domestic Corporations.*—In the case of a domestic corporation which was in existence before January 1, 1940, the excess profits credit for any taxable year shall be an amount computed under section 713 or section 714, whichever amount results in the lesser tax under this subchapter for the taxable year for which the tax under this subchapter is being computed. In the case of all other domestic corporations the excess profits credit for any taxable year shall be an amount computed under section 714. * * *

* * * *

(26 U.S.C. 1946 ed., Sec. 712.)

SEC. 713 [As added by Sec. 201, Second Revenue Act of 1940, *supra*, and amended by Sec. 4 (a) and (c), Excess Profits Tax Amendments of 1941, *supra*, and Sec. 228 (e)(2), Revenue Act of 1942, *supra*]. EXCESS PROFITS CREDIT—BASED ON INCOME.

(a) *Amount of Excess Profits Credit.*—The excess profits credit for any taxable year, computed under this section, shall be—

(1) *Domestic corporations.*—In the case of a domestic corporation—

(A) 95 per centum of the average base period net income,

(B) Plus 8 per centum of the net capital addition as defined in subsection (g) * * *

* * * *

(g) *Adjustments in Excess Profits Credit on Account of Capital Changes.*—For the purposes of this section—

(1) The net capital addition for the taxable year shall be the excess, divided by the number of days in the taxable year, of the aggregate of the daily capital addition for each day of the taxable year over the aggregate of the daily capital reduction for each day of the taxable year.

* * * *

(3) The daily capital addition for any day of the taxable year shall be the aggregate of the amounts of money and property paid in for stock, or as paid-in surplus, or as a contribution to capital, after the beginning of the taxpayer's first taxable year under this subchapter and prior to such day. In determining the amount of any property paid in, such property shall be included in an amount determined in the manner provided in section 718 (a) (2). * * *

* * * *

(26 U.S.C. 1946 ed., Sec. 713.)

SEC. 714 [As added by Sec. 201, Second Revenue Act of 1940, *supra,* and amended by Sec. 217, Revenue Act of 1942, *supra*]. EXCESS PROFITS CREDIT—BASED ON INVESTED CAPITAL.

The excess profits credit, for any taxable year, computed under this section, shall be the amount shown in the following table:

If the invested capital for the taxable year, determined under section 715, is:	*The credit shall be:*
Not over $5,000,00	8% of the invested capital.

* * * *

(26 U.S.C. 1946 ed., Sec. 714.)

SEC. 718 [As added by Sec. 201, Second Revenue Act of 1940, *supra*]. EQUITY INVESTED CAPITAL.

(a) *Definition.*—The equity invested capital for any day of any taxable year shall be determined as of the beginning of such day and shall be the sum of the following amounts, reduced as provided in subsection (b)—

(1) *Money paid in.*—Money previously paid in for stock, or as paid-in surplus, or as a contribution to capital;

(2) *Property paid in.*—Property (other than money) previously paid in (regardless of the time paid in) for stock, or as paid-in surplus, or as a contribution to capital. Such property shall be included in an amount equal to its basis (unadjusted) for determining loss upon sale or exchange. * * *

* * * *

(6) [As added by Sec. 203, Revenue Act of 1941, c. 412, 55 Stat. 687] *New capital.*—An amount equal to 25 per centum of the new capital for such day. The term "new capital" for any day means so much of the amounts of money or property includible for such day under paragraphs (1) and (2) as was previously paid in during a taxable year beginning after December 31, 1940 * * *.

* * * *

(26 U.S.C. 1946 ed., Sec. 718.)

Mississippi Code Annotated (1942):

Sec. 5327. *Stock must be actually paid for.* A note, obligation, or security of any kind given or transferred by any subscriber for stock in any corporation shall not be considered, taken, or held as payment of any part of the capital stock of the company.

Treasury Regulations 112, promulgated under the Internal Revenue Code:

Sec. 35.718-1. *Determination of Daily Equity Invested Capital — Money and Property Paid in.*—The equity invested capital for any day is determined as of the beginning of such day. The basis or starting point is found in the amount of money and property previously paid in for stock, or as paid-in surplus, or as a contribution to capital. * * *. For the purpose of determining equity invested capital, the amount of

any property paid in is the unadjusted basis to the taxpayer for determining loss upon a sale or exchange under the law applicable to the taxable year for which the invested capital is being computed. * * *

* * * *

Sec. 35.718-4. *Determination of Daily Equity Invested Capital—New Capital.*—(a) *In general.*—The equity invested capital for any day of the taxable year, as partially determined under section 718 (a)(1) to (4), shall be increased by an amount equal to 25 percent of the new capital, if any, for such day. The term "new capital" for any such day means the aggregate amount of money and property paid in for stock, or as paid-in surplus, or as a contribution to capital, and the amount of distributions made in stock and includible for such day under sections 718 (a)(1) to (3), subject, however, to the limitations provided in subparagraphs (A) to (F) of section 718 (a)(6).

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